National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: June 29, 1998

TO: William A. Pascarell, Regional Director, Region 22

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: AT&T, Inc., Case 22-CA-22197

This case was submitted for advice as to (1) whether AT&T (the Employer) violated Section 8(a)(2) and (5) of the Act by creating an employee-management committee to deal directly with the Employer regarding terms and conditions of employment, pursuant to a Union-negotiated program permitting such committees under certain circumstances, and (2) whether the case should be deferred under Collyer[(1)] where the Employer unlawfully delayed in providing relevant information but has provided it before the Union filed a grievance.[(2)]

FACTS

The parties have a long established collective bargaining relationship. The most recent collective bargaining agreement was effective by its terms from May 1995 through May 1998. The agreement contains a Workplace of the Future provision (WPOF), which creates a program whereby Employer and Union representatives jointly identify and discuss new approaches to resolving selected issues including the use of employee committees to involve employees directly in the creation and implementation of Employer initiatives.

Pursuant to the contract, the Union selects the bargaining unit employees who will participate on any committee on behalf of the Union. The WPOF model consists of a three tier system where proposals from joint Labor/Management committees are presented to a Planning Council, made up of Union officers and high-ranking Employer representatives, for mutual and cooperative decision. Proposals as to which consensus is not reached by the Planning Council are then submitted to the Constructive Relationship Council, also made up of Union and Employer executives, for decision. The contract contemplates use of the program only when both parties agree that it is appropriate. The Employer has conceded that participation in the program is strictly voluntary and that either party has the right to withdraw from the WPOF model at any time and engage in traditional collective bargaining.

On June 12, 1997,[(3)] the Employer presented to the Union its NSM-2000 project, which would consolidate multiple megas (geographic regions wherein customer calls are answered by the first available operator) into a single mega by the year 2000. The Employer proposed that the WPOF program be used to consider and determine any operational changes that should be made as a result of implementation of the project, including changes in employee terms and conditions of employment. The Employer suggested that the employee-management committee be comprised of the same employees who had served on two previously successful WPOF committees that participated in the creation and de-bugging of a new software system. The Union asserts that it informed the Employer at the June 12 meeting that it objected to the use of the prior employee committee, and that it would provide the Employer with a list of individuals who would serve on the new committee.[(4)]

The Employer convened the prior committee reconstituted it as the NSM-2000 committee and held the first meeting on July 15. Shortly thereafter, Union representative Lois Grimes voiced the Union's objection to the meeting to Employer District Manager John Hamilton, and asserted that the Employer had met with employees selected by the Employer over the Union's objections. On July 28 the Union by letter reiterated its objections regarding the composition of the committee and demanded that further planning and implementation of NSM-2000 be temporarily halted. The Union also requested a copy of the initial meeting minutes, as well as a list of each item discussed and its status.

The Employer continued to hold committee "meetings" in the form of at least eleven conference calls, in which the employees

it had selected participated, that took place between August and February 1998.[5] The Region's review of the minutes and agendas for those teleconferences indicate that discussions impacting employee terms and conditions of employment were held, and that decisions altering terms and conditions of employment were made during and/or based upon those discussions. Those changes included changes in the minimum rotation that must be worked prior to receiving a weekend off, scheduling of work and vacation by seniority in the larger mega rather than office seniority, assignment of overtime by alphabetical rather than seniority order limitation of the number of special request days off, and a shortening of the lunch break. The Employer has acknowledged these changes but contends that the contract gives it the right to make such changes unilaterally.

On April 7, 1998, the Union renewed its request for the information sought in its July 28, 1997 letter, and requested additional information including the minutes of all conference calls and other documentation relating to the performance of the committee. On April 8, the Employer provided the information requested in the July 27 letter and agreed to provide most of the information requested in the April 7 letter. The Employer provided no explanation for the delay in providing that information. By letter of April 24, the Employer provided a description of documents that would be mailed shortly in response to the April 7 request and stated its belief that the data provided would be fully responsive to the Union's requests. The Union has not asserted that the Employer's response was inadequate.

ACTION

We conclude that the Employer violated Sections 8(a)(2) and (5) by dealing with an Employer-dominated labor organization in derogation of the Union's exclusive representational rights. We further conclude that Collyer deferral is not appropriate here, since the Employer has no colorable contractual claim that its actions were privileged by the WPOF provision of the contract.[6]

The Region has determined, and we agree, that the NSM-2000 committee is a "labor organization" with which the Employer has been "dealing" regarding mandatory subjects of bargaining, and that the Employer has dominated the administration of the committee. Unless the Union has waived its exclusive bargaining rights through the parties' contract, the Employer has violated Section 8(a)(5) of the Act. Unless the Union has participated in the committee's formation and administration, through the contractually-adopted WPOF process, the Employer has violated Section 8(a)(2) of the Act.

Under Collyer and United Technologies Corp.,[7]

further proceedings on an unfair labor practice charge are deferred where the charge has at least arguable merit, the dispute is cognizable under the parties' grievance and arbitration procedure, there is no conduct that would constitute a rejection of the principles of collective-bargaining, and the charged party is willing to arbitrate the dispute.[8] A dispute may be cognizable under the parties' bargaining agreement and susceptible of resolution through the grievance-arbitration procedure even though it does not turn on the meaning of language in a specific contract clause.[9] However, the party urging deferral must present a colorable claim for a privilege based upon some provision in the parties' contract or their past practice in light of their contract.[10] As the Board has held, where "there is no claim, and indeed no room for any finding, that the contract's terms even arguably authorized the action taken by [the employer]," deferral is inappropriate.[11] Here, the Employer has no colorable contractual claim that its use of the WPOF employee committee program without the agreement of the Union and over its specific objections, was privileged by the WPOF provision in the contract. That provision specifically states that each use of the program is based on the parties' voluntary participation, i.e., the parties must agree to appoint a joint employee-management committee to address specific issues and make recommendations. Indeed, the Employer does not even assert that the contract gives it the right to engage in the WPOF program against the Union's wishes. Rather, it asserts that as soon as the Union clearly objected to the use of the program the Employer ceased dealing with the committee. In fact, meetings continued through teleconferences and the Employer made changes in terms and conditions of employment based upon those negotiations.

As the Region suggests, the Employer may have a colorable contractual claim that, within the parameters of the WPOF program, it was entitled to convene an existing properly constituted committee rather than forming a new committee to address issues presented by the NSM-2000 project. However, even if the Employer's interpretation of the contract were correct in that

regard, it would be irrelevant since the Union clearly objected to any use of the WPOF program to resolve NSM-2000 issues and there is no contractual basis whatsoever for the Employer's continued use of the program without the Union's voluntary participation.[(12)]

Furthermore, the Employer's argument that it was privileged to deal with the employee committee because the changes it made as a result of those negotiations were changes that the contract privileged it to make unilaterally is without merit. Regardless of whether the Employer would have been permitted to make those changes unilaterally, it was not privileged to deal with another labor organization in contravention of Section 8(a)(5), absent a clear Union waiver of statutory rights, and was not under any circumstances privileged to deal with a dominated labor organization, which the committee became absent the Union's participation, in contravention of Section 8(a)(2).[(13)]

Accordingly, the Region should issue a Section 8(a)(2) and (5) complaint, absent settlement.

B.J.K.

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[1] Collyer Insulated Wire, 192 NLRB 837 (1971).

[2] [*FOIA Exemption* 5].

[3] All dates hereafter are in 1997 unless otherwise noted.

[4] The Union did not provide such a list prior to the June 18, 1997 deadline the Employer asserts it gave the Union to make any changes in the make-up of the committee. The Union asserts that identifying appropriate employees to serve is a time-consuming task and could not have been completed in such short order.

[5] The Employer acknowledges that the Union objected, in its July 28 letter, to continuation of the WPOF process, and states that it then discontinued its dealings with the employees on the committee and thereafter dealt only with the management members. However, the evidence demonstrates conclusively that the Employer in fact continued to deal with employees on the committee during the conference calls.

[6] In view of this determination, it is not necessary to reach the issue submitted to Advice as to whether the Employer's unlawful delay in providing relevant information precludes deferral.

[7] 268 NLRB 557, 560 (1984).

[8] See generally "Guideline Memorandum concerning United Technologies Corp.", GC Memorandum 84-5, dated March 6 1984.

[9] See Inland Container Corp., 298 NLRB 715 (1990).

[10] Oak Cliff-Golman Baking Co., 207 NLRB 1063 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974) (where employer had implemented midterm wage cuts, in flagrant violation of contractual wage provisions, the Board found that the issue of whether the employer had violated its statutory bargaining obligation did not turn on an underlying dispute regarding the meaning of the contract's terms, because under no conceivable reading would the employer's conduct have been authorized). See also Collyer, 192 NLRB at 841-842 (deferral appropriate where unilateral employer conduct was based on a "substantial claim of contractual privilege" and therefore the contract and its meaning were at the center of the dispute).

[11] 207 NLRB at 1063. Public Service Co. of Oklahoma, 319 NLRB 984 (1995), cited by the Region, is not to the contrary.

There, the Board held that a direct dealing allegation was deferrable under Collyer where the employer had a colorable claim that it was not "dealing" with another "bargaining agency," in violation of the contract's exclusive recognition clause, when it fielded questions from the employees concerning terms and conditions of employment and later made unilateral changes in some of those areas.

[12] Indeed, even if the agreement precluded the Union from withdrawing from the program, or from changing the employees on the committee once a committee had been constituted, the agreement would involve the Union's selection of Section 8(b)(1)(B) representatives for purposes of collective bargaining - a permissive subject of bargaining which the Union could change during the contract's term. See Pittsburgh Plate Glass, 404 U.S. 157, 188 (1971). The Employer's failure to bargain exclusively with the Union's newly selected 8(b)(1)(B) representatives would be a violation of Section 8(a)(5) notwithstanding the agreement regarding that permissive subject of bargaining.

[13] [*FOIA Exemption 5*].